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No. 86-1163

In The
Supreme Court of the United States
October Term, 1986

Vera Rogers Jones, *et al.*,
Petitioners,
v.
The United States of America,
Respondent.

PETITIONERS' REPLY BRIEF

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ARGUMENT

The relevant facts in this case are undisputed. Although petitioners' land, Lot 1, was held in trust by the United States and was the subject of a court order forbidding its taxation, the United States allowed Nez Perce County, Idaho to illegally tax and sell it. Petitioners obtained the return of the land in 1979. The damages the petitioners were entitled to for the temporary loss of their land were reduced in 1983 specifically because of the United States' failure to act sooner than it did. Petitioners then filed this suit in 1984 for the damages they should have received but for the government's delay.

1. As we have shown, under decisions of the Court of Claims petitioners' temporary taking claim could not have accrued until Lot 1 was returned to them in 1979. The United States has responded by arguing that petitioners have not stated a proper taking claim and that, in any event, such a claim accrued no later than 1937 when the County sold Lot 1.

a. The only ground upon which the United States moved to dismiss this case was failure to comply with the statute of limitations. At each stage of these proceedings, however, we have shown that petitioners have a valid temporary taking claim. In allowing the County to tax and sell Lot 1, the United States, in effect took petitioners' property. The rather unique circumstances of this case do not negate the fact that there was an actionable taking.

It cannot be said that there was no authorization. The government's actions "cannot be characterized as unauthorized merely because they may have been mistaken, imprudent or wrongful." *Eyherabide v. United States,*

345 F.2d 565, 570 (Ct.Cl. 1965). And, in refusing, temporarily, to do something to recover the land, the government in effect confirmed and ratified the taking. *See United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *Shoshone Tribe v. United States*, 299 U.S. 476, 495-496 (1937). The fact that Lot 1 was not lost permanently is of no consequence. Temporary takings are recognized in the law of eminent domain. *R.J. Widen Company v. United States*, 357 F.2d 988, 996 (Ct.Cl. 1966); *cf. Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 888 (Fed. Cir. 1983). Finally, even though it was a third party that received the benefits of Lot 1, under these circumstances the government is liable just as if it used the property for itself. *Eyherabide, supra*, 345 F.2d at 570. Although Lot 1 was subject to the control and management of the government, "that did not enable the United States to give tribal lands to others, . . . without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.'" *Creek Nation, supra*, 295 U.S. at 110; *see also Shoshone Tribe, supra.*

b. Under *United States v. Dickinson*, 331 U.S. 745, 749 (1947), a taking cause of action does not accrue until the situation giving rise to the cause of action becomes stabilized. The United States says that the *Brooks v. Nez Perce County*, No. 2-72-27, litigation did not have the quality of continuing events contemplated by this Court in *Dickinson.*

Our point, however, is not that there was no accrual because of the *Brooks* litigation. Our argument is that there was no stabilization until Lot 1 was returned to peti-

tioners. That is precisely the holding of two Court of Claims decisions. *Castro v. United States,* 500 F.2d 436 (Ct.Cl. 1974); *Oro Fina Consolidated Mines, Inc. v. United States,* 92 F.Supp. 1016 (Ct.Cl. 1950) *cert. den.* 341 U.S. 948 (1951). The United States recognizes the possible inconsistency between those decisions and the Federal Circuit's decision in this case. Such an inconsistency, though, raises "merely an intracircuit conflict . . ." (United States' Brief at 10 n.3).

What the United States fails to acknowledge is that the Federal Circuit is a nationwide circuit. A conflict within the Federal Circuit affects litigants and claimants across the country. In addition, because of the similarity in language and subject-matter between 28 U.S.C. sec. 2501 and 28 U.S.C. sec. 2401, the correct interpretation of sec. 2501 would affect claims against the United States brought in the district courts of all of the other circuits.

2. Petitioners have shown that the other causes of action supported by the facts of the case are not barred by the statutes of limitations. In response to those arguments, the United States argues that the *Brooks* litigation was not a condition precedent to this suit. The United States also asserts that petitioners cannot state an indemnity claim.

a. The government states that petitioners could have filed a Tucker Act suit against it asserting: (1) that Hattie Rogers had title to Lot 1; and (2) that the United States had a duty to seek return of Lot 1. The United States fails to explain how that suit could have been filed without a determination that petitioners held valid title to Lot 1. It is beyond doubt that had petitioners filed such a suit, the United States would have challenged the assertion that

petitioners had title to Lot 1. It is disingenuous for the government to now suggest that it would not have defended a Tucker Act suit on that basis. Clearly, the establishment of petitioners' title to Lot 1 in the *Brooks* case was a condition precedent to this case.

The United States also suggests that even if title had to be established in *Brooks,* this case could have been filed on a protective basis. In essence, the government argues that petitioners were required to litigate a title suit in Idaho and, at the same time, file a case in the Court of Claims. The statute of limitations should not be interpreted to place such a burden on litigants. This Court has, in fact, stated that claimants will not be required to file premature protective suits. *Crown Coat Front Co. v. United States,* 368 U.S. 503, 514 (1967).

b. Although the statute of limitations was the only basis for the United States' motion to dismiss, petitioners have shown in the Claims Court and the Court of Appeals that the facts of this case support an indemnity cause of action. The government's rigid statement of the elements of an indemnity cause of action is incorrect.

Where a person is compelled to pay damages occasioned by another, an implied indemnity cause of action can be maintained. *See e.g., National Indemnity Company v. United States,* 444 F.Supp. 1356, 1360 (C.D. Cal. 1977) *affirmed Rudelson v. United States,* 602 F.2d 1326 (9th Cir. 1979). The claim is based on the principle that in such a situation equity and good conscience require that the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. *Id.; see also Flunker v. United*

States, 528 F.2d 239 (9th Cir. 1975). Further, it is a valid cause of action under the laws of Idaho, where Lot 1 is located. *Griggs v. Safeco Insurance Co. of America,* 103 Idaho 790, 654 P.2d 378 (1982); *May Trucking Co. v. International Harvester Co.,* 97 Idaho 319, 543 P.2d 1159 (1975).

The facts of this case support an indemnification claim. As has been recounted, there was a favorable title decision and a finding that petitioners were entitled to damages. At that point, the County asserted the United States' failure to act sooner. And, at the direction of the Ninth Circuit, the Idaho district court reduced the damages the petitioners were entitled to because the government "was most dilatory in exercising its role as trustee." compensate the County for the failures of the United *Brooks, supra.* In fact, the petitioners were forced to States. The petitioners now sue the government for that which they were forced to pay the County. The claim is one for indemnity. And, under the rules relating to indemnity causes of action, petitioners' claim did not accrue until the 1983 damages decision in *Brooks.*

———o———

CONCLUSION

In summary, under any theory of liability the statute of limitations did not run before this case was filed in November, 1984. In addition, as the Claims Court recognized the reasons for application of the statute of limitations fall away in this case.

> "[D]efendant's culpability appears to be established by an earlier court ruling. This earlier ruling is now final and binding on the parties to this lawsuit. Unlike most cases involving a statute of limitations defense, many of the policies underlying that defense do not apply here: there is no risk that time has clouded memories, that witnesses have died or disappeared, or that evidence has been destroyed.

Jones v. United States, 9 Cl.Ct. 292, 295 (1985). The decisions of the lower courts should be reviewed.

Respectfully submitted,

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April 1987